No. 15050

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES P. SANDERSON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on October 19, 1955, by the District Court for the Western District of Washington, Northern Division, awarding appellee $1,000 plus interest at 4 per cent from the date of the judgment (R. 23). The suit was brought by appellee on April 26, 1955, to recover the proceeds of a United States Treasury Bond that had been deposited with the Immigration and Naturalization Service as security on an alien's immigration bond which was administratively found to have been breached. The District Court ruled that the bond was not breached, although the alien had failed to appear upon a final administrative order, because a habeas corpus order

issued two years later and subsequent administrative review required by that order eventually led to the alien's admission to the United States. The jurisdiction of the District Court was founded upon 28 U. S. C. 1346(a). This Court's jurisdiction is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

In the Fall of 1946, Eng Kam, a foreign-born alien, sought admission to the United States at the port of San Francisco without a passport or visa on the ground that he is the son of a veteran of the armed forces of the United States and was therefore admissible under the provisions of the Immigration Act then in force (P. L. 271, 59 Stat. 659, 8 U. S. C. 232 (1946), (R. 9). On October 26, 1946, the local Board of Special Inquiry of the Immigration and Naturalization Service found that he had not sustained his burden of proving the alleged relationship and therefore rejected his application for admission (R. 9, 17). Eng Kam, through his attorney, commenced an administrative appeal from the ruling by the Board of Special Inquiry, and pending that appeal Sanderson (Eng Kam's attorney) secured Eng Kam's release from custody by (1) executing a "Bond Conditioned for the Delivery of an Alien" (R. 59-62) which provided for $1,000 liquidated damages unless its terms were satisfied, and (2) posting as security on this bond the $1,000 United States Treasury Bond involved in this suit (R. 9-10, 16). The critical provisions of that immigration bond were these (R. 60-61):

> NOW, THEREFORE, the conditions of this obligation are such that * * * (2) if, in case the said alien, upon such hearing or hearings, is found to be un-

> lawfully within the United States and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, the above-bounden obligors, or either of them, shall cause the said alien to be delivered at San Francisco, California, into the actual physical custody of an officer of the United States Immigration and Naturalization Service, upon and pursuant to the request of said officer or of any other officer of the United States Immigration and Naturalization Service, for deportation under the aforesaid warrant of deportation, and said alien is accepted by such officer, then this obligation to be void; otherwise to remain in full force and virtue. * * *

The alien's appeal to the Commissioner of Immigration and Naturalization was unsuccessful; the Commissioner affirmed the findings of fact and conclusions of law of the Board of Special Inquiry on January 10, 1949 (R. 10, 17). Then, as he was entitled to do under the applicable regulations, Eng Kam appealed to the Board of Immigration Appeals from the decision of the Commissioner. That Board, which represents the final administrative body empowered to review an exclusion order, affirmed the unanimous decisions of the Commissioner and the Board of Special Inquiry on July 1, 1949 (R. 10, 17). Thus, the administrative process for appeal had been exhausted. On October 19, 1950, the District Director of the Immigration and Naturalization Service made a demand upon appellee as an obligor on the immigration bond to produce the alien at the offices of the Immigration and Naturalization Service in San Francisco (R. 10, 17). The District Director's

order set the date by which the alien should be produced as November 15, 1950. However, appellee did not produce the alien at that time or at any subsequent time prior to his capture by representatives of the Immigration and Naturalization Service more than 16 months later (R. 10, 17). Shortly before the alien was recaptured by the Immigration Service, on March 5, 1952, appellee was advised by the Officer in Charge of Adjudications of the District Director's Office that the bond had been breached on November 15, 1950, and that he would recommend to the District Director that the security posted [redacted] be transferred to the United States Treasury unless within ten days appellee could show satisfactory reason why that security should not be forfeited (R. 10, 17, 43-44). Appellee filed no objection to the proposed forfeiture.[1] On March 25, 1952, the District Director ordered that the Treasury Bond be cashed on the ground that the Immigration Bond had been breached as of November 15, 1950, and that no satisfactory explanation had been given by appellee (R. 11, 18, 28-29). This ruling was subject to administrative appeal to the Commissioner within 10 days (see p. 5).

Three days later, on March 28, 1952, the alien was apprehended by the Immigration Service, and was held in Seattle for deportation (R. 17, 31). However, before he could be deported pursuant to the 1950 Order, Eng Kam instituted habeas corpus proceedings in the Federal District Court for the Western District of Washington (R. 11, 18). Those proceedings were

[1] Appellee testified that he did file a letter objecting to the forfeiture order (R. 45), but his testimony apparently refers to a letter appealing from the subsequent order of the District Director (R. 31).

begun on March 31, 1952 (R. 11) and on April 12, 1952, appellee notified the Commissioner of their pendency, urging that the previously ordered forfeiture of security should not be effected (R. 31). After acknowledging that notice on May 6, 1952 (R. 33), the Commissioner affirmed the District Director's order for the forfeiture of security on the Immigration Bond, on May 26, 1952 (R. 11, 19, 40).

The habeas corpus action was called for hearing on June 9, 1952. The district court ruled that the prior hearing had not been fairly conducted and that a writ of habeas corpus would issue unless a new hearing was afforded to Eng Kam within the next thirty days (R. 11, 18). Pending such a hearing, the court ordered that Eng Kam should be released on the security, if any, of the previously executed bond (R. 11). The court carefully noted, however, that its order was not intended to determine the status of the bond or the propriety of any administratively-ordered forfeiture (R. 66-67). A new hearing by the local Board of Special Inquiry was given Eng Kam on June 30, 1952 (R. 11, 18). As a result of that hearing, at which somewhat different evidence was presented, the Board reaffirmed its previous position by again ordering exclusion in a decision dated July 1, 1952 (R. 11, 18).

An administrative appeal was commenced from this new decision of the Board of Inquiry. Meanwhile, on September 24, 1952, the Federal Reserve Bank which was holding the Treasury bond, posted to secure the immigration bond, was advised by the Immigration Service to cash the bond and to credit the proceeds to the account of the United States, in accordance with the previous order declaring the bond breached (R.

11-12, 19). This transfer was accomplished on the next day, September 25, 1952 (R. 12, 19).

In the first administrative review of the new decision of the local Board of Inquiry the Commissioner again upheld the exclusion order. However, on April 21, 1953 (approximately seven months after the Treasury bond had been cashed and the proceeds transferred to the credit of the Government), the Board of Immigration Appeals reversed the two exclusion decisions and ordered that the alien be admitted (R. 12, 18). Two years later, on April 25, 1955, appellee brought this suit to recover the proceeds of the Treasury bond (R. 6) which had long since been declared forfeited and cashed by the Government.

In his complaint (R. 3-6), appellee alleged that officials of the Immigration Service "did wilfully, wrongfully and unlawfully declare the bond plaintiff had on deposit with defendant forfeited and did forfeit said bond." The Government's answer (R. 6-8) denied this and other allegations of the complaint and urged that appellee's complaint had not stated a ground upon which relief could be granted. At the conclusion of pre-trial proceedings, the district court issued a pre-trial order (R. 8-15) which set forth the mutually-admitted facts, admitted into evidence certain exhibits, and narrowed the issues and the contentions of the parties. Thereafter, trial was held at which the sole witness was appellee (R. 25-58).

At the conclusion of the trial, the district court entered Findings of Fact and Conclusions of Law (R. 15-22) and Judgment for appellee (R. 23) for $1,000 plus interest and costs on October 19, 1955. The United States filed a notice of appeal from that Judgment on December 16, 1955 (R. 24).

QUESTION PRESENTED

Whether security, posted to guarantee an alien's appearance for deportation upon order by the Immigration Service, was properly forfeited when the alien did not appear upon such an order and where he was recaptured only after extensive investigative work, even though subsequent judicial and administrative proceedings eventually led to the alien's admission to the United States.

SPECIFICATION OF ERRORS

1. The district court erred in ruling that the conditions of the immigration bond were not breached when plaintiff failed to produce the alien for deportation upon due notice and demand by Immigration and Naturalization Service officials.
2. The district court erred in ruling that a habeas corpus order excused retroactively the breach of the bond for failure to produce the alien on due demand and notice where the order was issued subsequent to the failure to appear on the ground that the hearing which led to the deportation order was procedurally improper.
3. The district court erred in ruling that a second administrative determination, under which the original final administrative determination was reversed and the alien was found to be admissible, retroactively obviated the necessity for the alien's appearance on the original order and excused the breach of the bond for failure to produce the alien on due demand and notice.
4. The district court erred in granting judgment to plaintiff.

ARGUMENT

Introduction and Summary

Under the terms of the bond agreement executed by appellee, the security posted by him was stated to be liquidated damages in the event that any of the conditions of that bond were not satisfied. The most fundamental condition of the bond was that which the Immigration Service ruled appellee breached, *viz,* upon determination that the alien is unlawfully in the United States and a request by an officer of the Service that the alien appear for deportation, appellee was obliged to deliver the alien into the physical custody of an officer of the Service at San Francisco. There is no dispute here that a final administrative order, from which no further appeal was available, was made that the alien here involved was not admissible to the United States and should therefore be deported. Nor is there any question that appellee was advised of this decision and was instructed to produce the alien for deportation on a date approximately one month after the notice. Furthermore, it is admitted that appellee did not produce the alien at that time or at any subsequent time; the Immigration Service obtained custody of the alien involved only after their own diligent efforts to recapture him over a period of almost two years.

Appellee relies, however, on the fact that certain subsequent events eventually led to the admission of the alien into the United States. In part A, *infra,* pp. 10-13, we show that appellee's failure to produce the alien was a proper basis for the forfeiture of the security posted; in part B, *infra,* pp. 13-19, we demonstrate that the subsequent events did not retroactively effect the legality

of the original deportation order or appellee's established liability on the immigration bond. The only subsequent events relevant to the condition of the bond breached by appellee were (1) the capture of the alien by the Immigration Service, (2) the habeas corpus order of the District Court based upon a determination that the original hearing was not fairly conducted, (3) the holding of a new hearing by the Immigration Service, and (4) the decision on the alien's last administrative appeal (from adverse rulings after the new hearing) that he should be permitted to enter the United States. We submit that none of these events detracted in any way from the legality of the deportation order when issued or relieved appellee of his liability which was fixed when he failed to obey that original order.

The irrelevance of events occurring, after the establishment of liability is shown by decisions interpreting other immigration bonds and by closely analogous rulings on criminal appearance bonds. Certainly, the eventual acquittal of one who has been released upon bail during criminal proceedings does not retroactively excuse any previous failure to appear in accordance with the terms of his bond. The only cases which are even inferentially contrary to this established principle concern instances where (1) the order to appear is so patently without legal basis at the time of its issuance that obedience is not required or where (2) subsequent legislation establishes a legislative intent to excuse retroactively disobedience of an order to appear as well as to eliminate retroactively the ground for detention which originally led to the posting of the bond. Not only do authorities postulating these two exceptions represent a highly questionable minority rule, but we

submit that neither of these situations has any application to the facts of this case.

Appellee's Failure to Produce the Alien Upon a Valid Request of the District Director of the Immigration Service, in Accordance With the Terms of His Bond, Finally Fixed His Liability.

A. *Appellee's Failure to Produce the Alien Upon a Valid Request of the District Director Was a Breach of the Bond for Which the Security Posted Was Properly Forfeited.*

It is clear from the language of an immigration bond that the undertaking of the obligor constitutes a promise by him that the terms of the bond will be fulfilled and that if the terms are not satisfied the security posted with the bond will be forfeited as liquidated damages for the breach. The Immigration and Naturalization Service need not release an alien from its custody pending administrative review of his application for admission. *United States ex rel. Kwong Hai Chew* v. *Colding, et al.,* 98 F. Supp. 717 (E.D.N.Y.); *United States ex rel. Soo Hoo Chew Yee* v. *Shaughnessy,* 104 F. Supp. 425 (S.D.N.Y.); cf. *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537. However, as a matter of practice, the Immigration Service does release aliens from its custody on some occasions and permits them to enter the United States temporarily during such administrative review, if their availability for hearings or deportation is guaranteed by the posting of sufficient security.

In this case, the alien involved was released in the United States, after the Board of Special Inquiry had determined that he should be excluded, pending ad-

ministrative appeals from that ruling to the Commissioner of Immigration and thereafter to the Board of Immigration Appeals (R. 9). His release was obtained only when his attorney, the appellee in this case, executed the form "Bond Conditioned for the Delivery of an Alien" (R. 59) and deposited a $1,000 Treasury Bond with a power of attorney to cash that Bond as security for the liquidated damages specified in the immigration bond (R. 63). By the terms of this contract, appellee agreed that the $1,000 Treasury Bond should be cashed by the Immigration Service and deposited to the account of the United States as damages *unless* (1) the alien appeared upon request for any hearing or hearings concerning his application for admission, *and unless* (2) the alien appeared upon request for deportation. We submit that the latter condition was plainly violated in the circumstances of this case. There can be no question that an authorized official of the Immigration Service did request appellee to produce the alien for deportation (R. 10, 17). Nor is there any doubt that appellee failed to comply with the request at the time specified in the District Director's notice to him or at any subsequent time (R. 10, 17). The plain terms of the bond, we submit, make it perfectly clear that appellee thereby failed to satisfy the conditions and forfeited his right to the security posted.

However, the district court interpreted the bond as requiring the alien to appear upon a request of the Immigration Service only after "it was finally and legally determined that he be deported" (R. 20). That construction of the bond incorporates new limitations on the terms of the agreement which wholly ignore their language and purpose. The first condition which had to be satisfied before the security was returnable

to appellee was that the alien appear upon a request by an officer of the Immigration Service for any hearing or hearings. Plainly a final legal determination of exclusion is not a requisite to the holding of a hearing. Nor does the language of the second condition (that which is primarily involved here) include the phrase inserted by the district court, for it provides that the security would be forfeited unless (after being found to be unlawfully in the United States by one or more hearing boards) the alien responds to a request by an officer of the Immigration Service to appear for deportation. There is no statement that the decision to deport him must be final or non-appealable or that it must comply with some external standard of legality. The purpose of the bond is obviously to give some assurance to the Service that it will not have to search for the alien when he is wanted for further administrative proceedings or action and to compensate the Service for expenses incurred if the alien does not appear voluntarily, whether or not the alien's admissibility status is finally determined at that time. That purpose would be defeated, or at least severely restricted, if the alien could be recalled only after it was "finally and legally determined that he be deported."

Moreover, even if the district court's construction of the bond were used, we submit that it is still apparent that the failure to comply with the request here involved was a breach of the bond. Appellee was not requested to produce the alien until more than a year had passed from the date of the decision by the Board of Immigration Appeals affirming the two lower administrative rulings of exclusion. The decision of the Board of Immigration Appeals was at that time established by statute as the final administrative determination in an

exclusion case. No additional deportation warrant is necessary in exclusion cases. Once an alien is in the custody of the Immigration Service after the Board of Immigration Appeals has affirmed an order for his exclusion, no further judicial or administrative act is necessary before he is deported. That decision was not reviewable by the courts, except by habeas corpus in cases where the administrative procedure was not conducted in the statutorily prescribed method. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206. Certainly the possible availability of the extraordinary writ of habeas corpus does not deny the fact that a final order of exclusion was made in this case by the Board of Immigration Appeals. Likewise, we submit that a decision of the Board of Immigration Appeals is clearly a "legal" determination where, as here, the Board plainly had jurisdiction over the subject matter and the parties involved in the dispute. The fact that there remains a remote possibility that the administrative review process will begin anew after a habeas corpus order is no evidence that the determination is not a "legal ruling", just as a final determination of a district court having jurisdiction over the subject matter and the parties is a "legal" determination despite the potentiality of reversal upon appeal.

B. *The Subsequent Events Involved Here Did Not Retroactively Affect Appellee's Liability on the Bond Which Was Fixed When the Bond Was Breached.*

It is a familiar rule in cases dealing with immigration bonds, as well as criminal appearance bonds, that upon a breach of the terms the obligor becomes the absolute debtor for the amount of the damages or pen-

alty. The courts have repeatedly rejected any suggestion that subsequent developments or occurrences relieve the obligor of his liability once the bond has been breached. See *e.g., Matta* v. *Tillinghast,* 33 F. 2d 64 (C. A. 1); *Kavounas* v. *United States,* 89 F. Supp. 689 (C. Cls.). In the field of criminal appearance bonds, for example, the courts have found that the defendant's failure to appear in accordance with the terms of a bond is not excused because the prosecutor later filed a *nolle prosequi* plea (*Detroit Fidelity & Surety Co.* v. *United States,* 59 F. 2d 565 (C.A. 8); *United States* v. *Nordenholz,* 95 F. 2d 756 (C.A. 4)), because the indictment was later dismissed (*United States* v. *Capua,* 94 F. 2d 292 (C.A. 7); cf. *United States* v. *Mack,* 295 U.S. 480), because the defendant was later apprehended and surrendered by the surety (*United States* v. *Rosenfeld,* 109 F. 2d 908 (C.A. 8), certiorari denied *sub nom Ladinsky* v. *United States,* 310 U.S. 646; *United States* v. *Hickman,* 155 F. 2d 897 (C.A. 7), because the defendant was later acquitted on retrial (*People* v. *Scopas,* 178 N.Y.S. 291, 109 Misc. 180), or because a conviction is later reversed on appeal (*Mayesville* v. *MtCutcheon,* 205 S.C. 241, 31 S.E. 2d 390; cf. *United States ex rel. Eisler* v. *District Director,* 87 F. Supp. 627 (S.D.N.Y.)).

There, as here, the bond serves to deter attempts to escape from the law enforcement agency and to compensate for expenditures made in attempting to recapture, if that should prove necessary. If an alien and the obligor on his immigration bond were encouraged to ignore the terms of the bond when they believed that they could upset an exclusion order on later administrative review, with or without the assistance of a habeas corpus order, the bond would have little or no value in deterring escape. Moreover, such a rule would

mean that the obligor would be free from liability in the very situation in which the Immigration Service is entitled to compensation, *viz.*, where it must expend money and effort to recapture the alien who refuses to appear voluntarily. Even though an alien believes that he is entitled to further administrative review or that he is entitled to a court order calling for such further review, he should nevertheless comply with all proper requests by the Immigration Service to appear. While in the custody of the Service the alien can raise any substantive or procedural objections that he may have to rulings as to his status, without violating the terms of the bond in any way. However, if he flouts the terms of the bond, we submit that his obligor's liability for the breach is wholly unrelated to the success or failure of later attempts to reverse the substantive exclusion order. Under the rule suggested by appellee, the status of a bond would never be settled since there is always a possibility that some later developments will cause a reversal of the exclusion ruling upon which the custody and bond were premised. Indeed, even if after a breach of the bond the alien were recaptured and physically deported, it is still conceivable that upon a new application for admission and a new hearing the alien might be successful in showing that the first decision was erroneous and that he has always been entitled to admission. Such a construction of the bond, in light of its obvious purpose, is patently without merit. Cf. *Kavounas* v. *United States,* 89 F. Supp. 689 (C. Cls.).

The events in this case which occurred after the breach of the bond and which are conceivably relevant thereto are (1) the capture of the alien by the Immigration Service after approximately two years investigative efforts, (2) the habeas corpus order of the district

court calling for a new administrative hearing on the ground that the original hearing was not fairly conducted, (3) the holding of a new hearing by the Immigration Service which resulted in a new decision by the local Board of Special Inquiry that the alien was not admissible, and (4) the decision of the Board of Immigration Appeals on the alien's appeal (from two adverse administrative rulings based on the new hearing) that he was in fact admissible to the United States. Certainly the first of these occurrences does not strengthen appellee's position. It is firmly established by the courts that recapture of an alien released on bond or a criminal defendant released on bail is irrelevant to the obligor's liability for failure to produce the alien or defendant at the specified time and place. See, *e.g., Tennessee Bonding Co.* v. *United States,* 125 F. 2d 138 (C.A. 6). If that fact has any significance here, it is important only to show that this is an especially appropriate case for the payment of damages to compensate for investigative expenses.

The second event (*i.e.,* the habeas corpus order) also fails to support appellee's claim here since the court ruling on the application for habeas corpus did not purport to make any ruling as to the parties' rights on the bond agreement (R. 66-67), and since a decision that new hearings should be held does not detract from the fact that the alien did not appear on a previous occasion when he was instructed to do so by an authorized official of the Immigration Service. This development finds its parallel in criminal appearance bond cases in the situation where the convict "jumps bail" but a new trial is subsequently ordered by an appellate court. There, as here, the existence of further proceedings which could lead to either a favorable or unfavor-

able result does not excuse a past breach of the bond. Cf. *Southern Surety Co.* v. *United States*, 23 F. 2d 55 (C.A. 8), certiorari denied, 278 U.S. 604.

The third occurrence (*i.e.*, the holding of a new hearing) is significant only insofar as it shows that further consideration was being given to the alien's application for admission. As we noted above (p. 11) the alien was obliged to appear for intermediate hearings as well as upon a final order for deportation, so the fact that his case was being reconsidered does not show that his previous actions were consistent with the terms of the bond.

Finally, the fourth occurrence (*i.e.*, his eventual release from custody upon a reversal by the Board of Immigration Appeals), which is the primary basis for the district court's ruling, does not serve to justify the prior breach any more than the above enumerated subsequent developments. This event is comparable to the acquittal, the dismissal of an indictment, or the reversal on appeal which do not excuse prior wilful violations of a criminal appearance bond (see cases cited at p. 14). It is true that in this case the alien was eventually admitted to the United States, but it is also true that the Immigration Service had to search for him for two years when he refused to appear as ordered. We submit that if there is any difference between the rule applied in criminal bond cases and the rule applicable in immigration bond cases, it is that the discretion which rests with a district court in proceedings for the forfeiture of a criminal bond is absent in dealing with immigration bonds since the latter bonds are more properly contracts for liquidated damages rather than criminal penalties. See *Matta* v. *Tillinghast*, 33 F. 2d 64, 65 (C.A. 1). Therefore whatever discretion is applied in dealing

with liability on immigration bonds must be exercised by the Immigration Service itself, just as the discretion to forgive a breach of any other contract rests only with the aggrieved party thereto. In that light, we urge that the burden imposed upon appellee as an obligor on an immigration bond is at least as great, if not greater, than the burden which is carried by a surety on a criminal bail bond. Thus in this area, as in the field of criminal appearance bonds, an eventual substantive determination in favor of the party released from custody does not relieve his obligor from liability which attached when the person released refused to permit orderly procedure in the disposition of his case.

The few cases which even suggest that a subsequent occurrence may retroactively affect liability on a bond can be classified in two categories: (1) instances where the substantive basis for custody is retrospectively considered so patently spurious that there could be no obligation to return to custody despite the terms of a bail bond (*State* v. *Bryant,* 90 Wash. 20, 155 Pac. 420; *Leontas* v. *Walker,* 166 Ga. 266, 142 S.E. 891); and (2) cases in which subsequent legislation is interpreted to excuse retroactively not only the substantive basis for custody but any procedural violations of the terms of a release from custody (*United States* v. *Manufacturer Cas. Ins. Co.,* 113 F. Supp. 402 (S.D.N.Y.)). The former situation can be explained in contractual terms on the basis that the contract for release from custody was void for a total lack of consideration; in those cases the courts have ruled that there was no breach because there was no valid bond, rather than concluding that the later exoneration from criminal liability excused a

prior breach of the bond. The latter type of ruling is based upon the language of a particular act of the legislature. Both such doctrines represent a minority view which is subject to the very serious criticism that unless extreme care is used, violations of security bonds of this type will be encouraged among those who are willing to take a chance on their eventual success in the courts or the legislature. See *United States* v. *Du Faur,* 187 Fed. 812 (C.A. 7), certiorari denied, 223 U.S. 732; *Goldsby* v. *State,* 159 Tenn. 396, 19 S.W. 2d 241. In any event, neither of those situations has any application to the facts of this case so as to support the position taken by the district court.[2]

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[2] In the court below appellee also argued that the Immigration Service had no right to forfeit the security posted to guarantee the performance of the terms of the immigration bond, relying upon decisions of this Court and other courts that the Immigration Service has no power to make a final non-reviewable decision as to a breach of the bond. *United States* v. *Western Surety Co.,* 118 F. 2d 703 (C.A. 9), *Kubara* v. *United States,* 89 F. 2d 965 (C.A. 3). The Government does not contend, however, that the decision of the Immigration Service was unreviewable in the courts. Rather we argue only that the Government, like any other party to a contract, has the right to determine that its contract with another has been broken and to retain any deposit or security given by that other party to guarantee performance. Although appellee has the right to bring this action against the United States, he cannot recover here, any more than he could recover against a private defendant, unless he can affirmatively show that he is entitled to a return of money deposited as security for the performance of his contractual promises. Cf. *Matta* v. *Tillinghast,* 33 F. 2d 64, 65 (C.A. 1). Or, from another viewpoint, it is certainly clear that appellee is not entitled to recover on the contract involved unless he can first satisfy his burden of showing that the contractual conditions precedent to the return of his security have been satisfied.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded with instructions to dismiss the action.

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